

“I thought he was guilty, but . . .”

Successful SEX CRIMES Jury Selection

Begin at the Beginning . . .

- I am not a jury consultant or a shrink
- But we are prosecutors
 - We meet with victims of rape
 - We have reactions to them
 - We watch how other people respond to them
 - We watch how they interact with others

Jury Selection

Preliminary Thoughts

- Does your jury selection sound like a cross examination?
- Will your questions actually elicit information from a juror?
 - Will it be truthful or what the jury thinks that you want to hear?

Ultimate Goal

- Select jurors capable of “pulling the trigger”
 - Say state proved case
 - Say they don’t believe defense
 - Say GUILTY

Jury Selection in Sexual Abuse Cases

PUBLIC PERCEPTION ABOUT SEXUAL ABUSE CASES

What Do Jurors Think About?

- Women?
- Sex Crimes Victims?
- What's the first thing you think of when you hear a person say "I was raped?"

What Do Jurors Think About Women?

- Women lie
- Women are emotional
- Women would do anything to get back at a man
- “Accuser?” . . . *Only in sex assault / DV*

Assessing Your Case

- **You need to know where your case is weak**
 - Not just legitimately weak but where your case lacks jury appeal
- Quote from a prosecutor:
 - **There are only 2 questions a jury must answer before convicting:**
 - **Did the defendant do it?** and
 - **Why do I care?**

Assessing Your Case

- **What reasons will jury have to not care about victim or this type of crime?**

Assessing Your Case

- What are the weaknesses in your case, individually?
 - Talk to your professional witnesses
 - Questions about veracity of allegation?
 - Talk to friends and family
 - What questions do they have?
 - Roundtable your case with other prosecutors

Know How Your Case Will Affect Jurors

if
the jury believes all of the state's evidence
and
believes that you proved **every** element
why would the jury still acquit?

People Lie

- Will your juror acquit because “people lie” about rape?
 - Do people lie about rape?
 - Do serial rapists exist?
 - So should you convict an individual charged with rape just because some people are serial rapists?
 - Likewise, should you acquit because some people lie about rape?
 - What if a juror said . . .

Because If You Were on Law Review, You Probably wouldn't be a Prosecutor

KNOWING THE LAW

Know What Your Courts Allow

- **What is Prosecutorial Misconduct in Jury Selection?**
- **If you pose a hypothetical question, how close does it come to the facts?**
- **Questions about prior jury service?**

Court Permissible *BUT* . . .

- **Never go fact-specific!**
 - **Can you believe a certain witness?**
 - Juror responds with request for specific info
 - **WHY** do you want to know that?

What Can You Ask?

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| <ul style="list-style-type: none"> • Demonstrate need for specialized voir dire <ul style="list-style-type: none"> – Not indoctrination Judge. I'm trying to determine whether this juror has a preset belief on an issue that would impact his / her ability to decide this case based on OUR facts and the law, as opposed to a general belief about rape | <ul style="list-style-type: none"> • Keep media and public comments <ul style="list-style-type: none"> – Use as talking points – Use to show beliefs in your community |
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Importance of Question Clarity

- **Dishonest answers**
 - **Must demonstrate that juror gave a dishonest answer to a material question AND that correct response would have provided valid basis for challenge for cause**
 - **OR**
 - **Must demonstrate that right to impartial jury was otherwise violated by actual or implied bias**
 - **Hamilton v. Ayers, 583 F.3d 1100 (9th Cir. 2009)**

Strategy: Batson

- Batson and progeny involves a three-part analysis
 - First step: Opponent of a strike must make a prima facie showing of racial discrimination.
 - When trial court asks for race neutral reason, there is an implicit finding by the court that there is a prima facie case established.

Strategy: Batson

- Second step:
 - Burden shifts to strike's proponent to give race-neutral reason for the motion to strike
 - Reason's strength depends on facial validity

Strategy: Batson

- If race-neutral reason provided, Court must determine whether opponent of strike has proven discrimination notwithstanding offered neutral reason.
- Persuasiveness of reason for strike / motion becomes relevant here.
- Issue is whether there is purposeful discrimination

Jury Selection

CRAFTING QUESTIONS

Golden Rule of Jury Selection

- You will never change a juror's deeply held, pre-conceived opinions.
- You just want to uncover those opinions during voir dire so that you can get rid of the freaky people who will tank your jury.

Governing Principles

- 1) identify who can make decisions
- 2) rule out people whose world-view does not allow for rape to actually happen except in the most obvious cases
- 3) address case-specific issues

I AM THE DECIDER

Line of Questioning: The Decision

- Major decision made in last 2 years
 - Factors you took into account in making decision?
 - Consult others in making decision?
 - How did you choose who you would consult?
 - Make final decision?
 - How do you feel about decision you made?
 - Feel good about *how* you made decision, even if, in retrospect, you might make a different decision?

Two-Sides

- Are there really two-sides to every story?

“well of course I believe Elizabeth Smart was raped!”

WORLD VIEW

Can You Convict on the Word of a Child?

- Look to juror experience with children
 - They don’t lie to get themselves into trouble
 - There is nothing positive about a child abuse disclosure
- Police rely on children
 - Children who call 911 on behalf of a sick or injured parent
 - Children who report the abuse of one parent at the hands of another
 - Elizabeth Smart’s sister who told her parents “I think the man was Emanuel”
- Doctors and parents rely on children
 - Describe medical symptoms
- Sometimes children can be painfully candid!

Convicting on Word of Child

- Ask jurors if they see any type of evidence requirement
 - Specific number of witnesses?
 - DNA? Fingerprints?
 - Confession by defendant?
- There's no requirement because we can convict on word of child
 - Do you think that the law *should* require physical evidence? Corroboration? Why/ why not?
 - Give a fondling example

Convicting on Word of Child

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| <ul style="list-style-type: none"> – Kids believe in Santa because we tell them to – We do specific things that encourage those beliefs <ul style="list-style-type: none"> • Pics with Santa • Cookies for Santa • Entire season dedicated to this | <ul style="list-style-type: none"> – It's not just one person who tells a child to believe – Believing in Santa is fun and has rewards |
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Convicting on Word of Child

- Now let's contrast the fun of believing in Santa with the fun that it has been honoring your jury subpoena.
 - Anyone get up at the crack of dawn this morning with excitement of a Christmas morning?
 - Why not?
- How did you know what to expect?
 - Anyone think that you might be hearing about child sexual abuse?
 - And if that thought did cross your mind, was that at all exciting?

Convicting on Word of Child

- Disclosing information of a personal nature in front of others?
- But everyone here is an adult, right?
- Does anyone here think that any of your answers to my questions could cause your family to turn their backs on you?
 - Why don't you think that?

Convicting on Word of Child

- So if you were impaneled on the jury and a fellow juror said to you “The kid seems believable, but how can I believe a child?,” how would you respond?
- **Is there anyone who cannot convict a person on word of child?**
 - Why not?
 - *Would it matter what crime child witnessed?*

The Killer Lie

- **Myth: Women lie about rape so I can't believe anyone**

Lying

- Analogy:
 - Cell phone repair
- Example:
 - Attorneys / clergy with bad reps
 - Writing a mortgage

Women Lie

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| <ul style="list-style-type: none"> • Women lie about domestic violence and rape <ul style="list-style-type: none"> – People lie vs. THIS person lied – People lie during jury selection <ul style="list-style-type: none"> • Why might someone lie during jury selection? • Should I presume deception? | <ul style="list-style-type: none"> • Do I generally believe women lie about rape? • Do I believe that rape is easy lie to tell? • Do I come to table presuming she's lying? <ul style="list-style-type: none"> – Or there must be more to this since it's going to trial? |
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Do You Know Your Case?

THE NITTY GRITTY

Common Juror Issues with Sexual Violence

- **Victims Who Don't "Act" like Victims**
- **Consent**
- **Rape Unaware**
- **Inconsistent Statements**
- **Delays in Disclosure**
- **Loyalty to offenders (intimate partner cases)**
- **Male Victims**

Victim Behaviors

- Juror on the spot
- Last painfully embarrassing moment
- How would you feel if . . .

Victim Demeanor

- Courtroom Demeanor:
 - Tragic events in your community
 - Describing consensual sexual experiences

Inconsistent Statements

- Inconsistent statements
 - Car accident analogy
 - We never tell same story the exact same way every time
 - How much we tell of the story depends on the audience & questions asked
 - Being inconsistent doesn't make us unreliable. It makes us human.

Inconsistent Statements

- How does *tone* of the question affect the way it's answered?
 - If you feel like you're being belittled, who does that affect desire to answer questions?
 - Questions by a "Customer Service Rep"
 - Make you feel dumb?
 - Like you did something wrong?
 - How do you respond to that?
 - Might a victim / witness do the same?

Inconsistent Statements b/w Witnesses

- Childbirth analogy
 - Father's perspective vastly different than mother's!
 - Where you stand?
 - Pain and fear vs. rested and sedated
 - No one remembers every medical person in room.
 - Name vs. appearance
 - Function vs. attire
 - How accurate are their measures of time are?
 - Order of events?
 - How long something lasted?

Consent

- Force?
 - Why is it from the perspective of the victim?
 - Armed robbery / store clerk
 - Some fight and some freeze: does it matter?
 - How does a bank robber choose a place to rob?
 - Question isn't "What would I do?"
 - Question is "what did victim believe"

Permission for Sex

- When is it OK to force a person to have sex?
 - What about “pushing” a little harder?
- What about other crimes committed against intimates?
 - Bodily integrity more important than property?
- Which is harder to recognize as wrong:
 - betrayal by a stranger or by someone you love?

Prior Sexual Contact

- Consent Once =
Consent Forever
- The Charitable
Donation
 - Given to online charity
 - Solicited after the
donation but didn't give
 - What if the charity
withdrew money
without consent from
you?

But They Were Sexting . . .

- Communication with a Salesperson
 - I want to buy
 - I am interested in your car
 - I financially qualify to buy your car
 - I even test drive your car
 - I let you run my credit
 - You draw up a contract
- . . . And then I walk away.

Isn't This Just Drunk Sex?

- Drunk driving?
 - Is being drunk an excuse for drunk driving?
 - What if a drunk driver hit and killed a drunk person?
 - Are drunk and high people victimized?
 - Credit card fraud?
 - Robbery?
 - “Knock out” game

I didn't mean to . . .

- I didn't know . . .
 - She couldn't consent
 - She was drunk
 - He was underage
- Does person have to verbally acknowledge intent for you to know what they mean?
- In everyday life, we look to actions, not words

But He Was Drunk Too

- Use examples like drinking and driving crash
- Homicide where killers were addicts
- Affect of alcohol on penis
- Would you let her operate your penis?

Turning Myths Into Voir Dire

- Myth:
 - Statutory rape is no big deal
 - If a child “provoked it,” we should not blame the “abuser”

Compliant Victims / Victim Blaming

- Why isn't consent an element of statutory rape?
- Story about my brother
 - He wanted to drive the car
 - HE thought he was ready
 - The hole in the den said otherwise
- Other crimes with no “consent” defense
 - Alcohol to minors
 - Possession of firearm by a felon
- Look out for people who are anti-government

Compliant Victims: Authority Figures

- Ever had a political discussion with someone – who had power over you – where you verbally agreed with them even though didn't actually agree?
 - Why?

Delay in Disclosure

- Delayed Disclosure = witness kept a secret
 - Almost every adult has kept serious secret
 - It doesn't make the adult un-credible
 - It doesn't make the secret false
 - Since the defendant encouraged secrecy and lying, why is victim now a liar?

Delay in Disclosure

- The Bad Boss
 - Review things that bosses do
 - How it made juror feel
 - Didn't quit right away
 - May not have told
 - Only told when safe
 - Liked job but wanted abusive conduct to stop

Male Victims

- Can a man be a victim?
 - When you hear a man say he's been sexually assaulted, what comes to mind?
 - Should a man have to fight harder to show lack of consent?
 - (malesurvivor.org and 1in6.org)

Turning Myths Into Voir Dire

- Myth:
 - Boys aren't real victims

Male Victimization

- Myth:
 - Boys aren't really harmed by "sex with older woman"

Male Victimization

- Do you wear sunscreen?
 - Why?
 - We do some things to prevent even the possibility of future harm
- Explore the rationale for the law
 - Law doesn't say women aren't perps
 - Law doesn't say boys aren't victims

Divided Loyalties / Reluctant Witnesses

- Divided loyalties: Embarrassing Family Member
 - Just because we kept quiet about the negatives, it doesn't make them go away
 - And we may have waited until we were "safe" to tell anyone about them

Recantation

- You're right, I'm wrong.
 - Have you ever “taken something back?”
 - Why did you do it?
 - Were you telling the truth when you took it back?
 - How can you trust a person who has “taken it back?”
- Have you ever “told on” someone but then felt bad about telling?
 - Desire to mitigate impact ≠ deception

CSI Effect

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| <ul style="list-style-type: none"> • Do you watch it? <ul style="list-style-type: none"> – Why do you watch it? – Do you watch any reality shows about relationships? <ul style="list-style-type: none"> • Guiliana and Bill? • Real Housewives? • 19 Kids and Counting | <ul style="list-style-type: none"> • Can I evaluate your relationship using any of those shows? <ul style="list-style-type: none"> – Why not? • What if a juror said “I saw this kind of testing . . . “ |
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Analogy / Examples: Prioritize Questions

- Strategize for admissible analogies
- Always memorize your “wrap up”
- Be prepared to quickly and succinctly explain to the Judge

Keeping Profiles in Mind

SHEPHERDS, SHEEP, AND FREAKS

Types of Jurors

- Shepherds
 - Strong character
 - Comfortable in leadership role
 - Make decisions based on logic and common sense

Types of Jurors

- Sheep
 - Followers
 - May not have well-developed opinions
 - May have an initial emotional reaction but can be made to see logical arguments

Types of Jurors

- Freaks
 - Desire to establish power / gain clout or fame
 - Self-serving or emotion-based decision making
 - What does social media tell you about this juror's beliefs?

The “Good Sheep?”

- Can you at least find good sheep?
 - Juror who will follow logical direction and strong leadership
- Once you have some strong leaders who are State friendly, it's OK to find some sheep, provided they are not freaks in sheep's clothing!

Caution: Stealth Jurors

- Stealth Jurors:
 - Intentional deceit to get on a jury
- Emphasize the oath:
 - “Why do you think the judge placed you under oath?”
- Explore contradictions
 - You said vs. questionnaire says
 - Get affirmation of questionnaire under oath
- Just ask:
 - “Has anyone here terminated membership in a group for the purpose of getting on this jury?”

Knowing Who Can Handle Your Case

- Will your juror focus unfairly on victim behavior?
- Does your juror always look for benign explanations for bad events in life?
 - Have a hard time believing negative things about people?

Who Can Handle Your Case

- Are they good decision-makers?
 - How do they make difficult decisions?
 - Comfortable with decision-making?
 - How often do they have to make decisions that affect others?
 - How do they go about making those decisions?
 - How do they make decisions on a team?

Finding Good “Deciders”

- What does prospective juror (PJ) do for a living?
 - How often does the PJ have to make tough decisions?
 - How reliant is PJ on supervisor to make final judgments?
- How does PJ make decisions in personal life?

Finding Good “Deciders”

- Are there things in this PJ’s background that would cloud their ability to make a difficult decision well?
 - Prior victimization?
 - Prior accusation (friend / family / self)?
 - Bad experience with police?

Finding Good “Deciders”

- Will juror identify with defendant?
 - Same profession / background
 - Look like they could be friends?
 - Things about defendant that will make juror want to fight for him?
- PJ / Defendant Identification:
 - Fight for “the underdog”
 - “Stick it to the man” attitude
 - Make living by making excuses?
 - Deception involved in their job?

Final Caution: Social Media

- Facebook and Twitter may be most dangerous
- Also consider blogs or online journals
- Do you have a Twitter account?
 - Who do you follow?
 - Ever tweeted on behalf of someone accused of a crime?
- Facebook account?
 - To which pages have you subscribed?
- Keep an account of your life or your family's life anywhere online?

General Advice

- But I can't ask ANY questions?
 - Can you determine:
 - Decision-making in everyday life
 - Criminal history / police involvement
 - Mother with adult son living at home
 - Writing on questionnaire
 - Late arrival?
 - Was he / she a tattletale?

General Advice

- But I can't ask ANY questions?
 - Read body language:
 - Hostile to the State
 - Doesn't want to be there
 - Reading material
 - Disrespect for court

Identify Myth-Believers

- Make it OK for your prospective jurors to actually tell you what they are thinking
- Craft questions that address myths and beliefs systems without asking the ultimate question
- Follow Adrienne's Rules . . .

Rule #1:
Always Have
Someone Sit With You
During Jury Selection

Rule #2:
Talk to every juror

Rule #3

- Never Keep a Juror Who Has Acquitted on Another Jury or Been Accused of this Type of Crime (Inc. Family / Friends)

Rule #4

- As a general rule, survivors don't make good jurors . . . but they can educate your prospective jurors.

Rule #5:
Don't Waste a Lot of Time on Jurors You're
Going to Strike

Rule #6:
Voir Dire Is Like Dating:
If You're Talking Too Much, You're Doing It Wrong

Rule #7:
Don't be afraid
to question jurors
about controversial
subjects

Rule #8:

**Watch the body language of other
jurors when “freaky” juror is speaking**

Rule #9:
Be Suspicious of Jurors Who Won't
Answer Your Questions

Rule #10:
Always Try to
Hold Back One Strike

Rule #11:

Always Ask
“Is There Anything I
Should Know About You”
and
“Are There Any
Questions You Have
for Me?”

Rule #12:

LISTEN, LISTEN, LISTEN

Never Forget: Why Jurors Acquit

- NEVER forget underlying issues in your case
 - Even if your jury believes all of the evidence that you present and believes that you have technically met the elements of every crime charged, why would they still acquit?

- Every juror has a secret.
- The question is “how will it affect your case?”

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